IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 5TH JANUARY 2007 / 15TH PAUSHA 1928

CRL.A.No. 207 of 2006(C)

SC.1656/2003 of ADDL. DISTRICT & SESSIONS COURT (ADHOC)-I, KOLLAM
CP.80/2002 of JUDL.MAGISTRATE OF FIRST CLASS-II, KOLLAM

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APPELLANT:

VINOD, S/O. CHELLAPPAN,
C.NO.9921, CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM-695 012.

BY ADV. ADV.SABU GEORGE(STATE BRIEF)

RESPONDENTS:

THE STATE OF KERALA,
REPRESENTED BY A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. C.M. NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No.207 OF 2006

Dated this the 5th day of January, 2007.

JUDGMENT

The appellant faced trial for an offence punishable under Section 402 of the I.P.C on the allegation that he and four others were found assembled with weapon to commit docoity at Curbala junction, Pattathanam west, Kollam district on 14.6.2002 at about 2.30 a.m. To prove the case against the appellant, prosecution examined Pws 1 to 5 and relied on Exts.P1 and P2. MO1 was also produced. The police charge was that the appellant and four others involved in the commission of the alleged crime . Before the final charge and the trial, the four persons, members of the assembly, were reported absconding. Hence, the case against the other accused was split up and the appellant alone faced trial. On closing the prosecution evidence, the appellant was questioned under Section 313 of the I.P.C. Denying the prosecution allegation, the appellant had stated that on the day of the incident he was arrested from the railway station

premises by the police while he was standing on the road after having liquor and he was not in a position to take care of him. Further, the appellant had stated that no other persons were along with him and the police had foisted the case against him purposefully. However, relying on the evidence adduced by the prosecution, the court below found the appellant guilty under Section 402 of the I.P.C and he was convicted thereunder and sentenced to undergo R.I for three years. Against the conviction and sentence ordered by the trial court, this appeal is filed through the jail authorities.

2. Since the appeal is not defended by a counsel of his own choice, a member from the State brief panel has been appointed to argue the case for the appellant. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor. The learned counsel appearing for the appellant had three fold submissions before this Court. Firstly, the learned counsel submits that the trial court committed serious error in believing the evidence of Pws 1, 4 and 5, who are the police officials, as their evidence is not supported by any independent evidence.

Secondly, the learned counsel submits that the trial court is not justified in finding that the appellant is one among the five persons alleged to have been assembled on the day of the incident at Curbala junction as there was no evidence adduced by the prosecution to prove that who are the other accused assembled along with the appellant. Thirdly, the learned counsel submits that the trial court went wrong in finding that the recovery evidence adduced by the prosecution is enough to find the appellant guilty under Section 402 of the I.P.C.

3. The prosecution case itself is revealed from the evidence of Pws 1 and 5. PW1 is the head constable, who accompanied PW5, the Sub Inspector of Police on the day of the incident along with some other police officials for law and order duty. According to PW1, when they reached at Curbala junction, they have seen four or five persons assembled on the road and when they reached them, one of the persons ran away from the group and the other four persons were there including the appellant. Further, this witness has stated that when PW5 questioned the appellant,

he had answered that there were four more persons at the junction to do some mischiefs in the night. Further on questioning the appellant by PW5, it was revealed that the appellant had having MO1 with him wrapped in a newspaper. Further, this witness has stated that on questioning the appellant it was revealed that MO1, an iron rod, was kept for using the same for committing decoity or robbery in the night. The evidence of this witness would also show that after arresting the appellant from the spot, a crime was registered against the appellant and four other unknown persons though three names were contained in Ext.P2 F.I.R. The evidence of PW5 is also in corroboration with that of PW1. PW5 is the S.I. of Police, who had detected the crime against the appellant. PW5 had stated before the court that on the day of the incident himself, PW1 and other officials went to the Curbala junction and they have seen 4 to 5 persons assembled on the road and on further questioning them, they were not given any satisfactory answer for their assembling on the road. This witness had further stated that the appellant was arrested from the spot and on further questioning him, it was found that MO1 iron

rod was kept by him to use in the night to commit decoity. On the basis of the statement of the appellant, MO1 was recovered under Ext.P1 mahazar. Further evidence of this witness would show that a case was registered against the four named persons and another unknown and unnamed person. However, there was no evidence before the court to show that any other accused other than the appellant were arrested by the police or produced before the court. The evidence of PW4 would also show that he was the Additional S.I. of Police, who continued the investigation and filed the final charge against the appellant. Though the prosecution examined Pws 2 and 3 as independent witnesses to prove the recovery of MO1 as the signatories of Ext.P1 recovery mahazar, they have turned hostile to the prosecution and stated that they never signed Ext.P1 or present at the scene or watched anything as stated by Pws 1 and 5. The question to be analysed in the appeal is that whether the evidence of Pws 1 and 5 is enough to find that the appellant had committed the offence as alleged by the prosecution. In this context, it has to be noted that the prosecution miserably failed to prove the allegation against the appellant by

adducing any independent evidence other than that of the evidence of Pws 1 and 5. The learned trial judge found the evidence of Pws 1 and 5 is enough to prove that the appellant was one among the five persons who alleged to have assembled at the Curbala junction on the day of the incident and he was arrested and MO1 was recovered on the statement given by him. But, it has to be noted that though the police had a case that the police arrested the other accused, who were parties to the alleged assembly, but there was no piece of paper produced or marked to show that the police have arrested any of them. However, the learned trial judge found that the other accused could not be arrested because they were as if absconding. This Court is not in a position to find that such an absconding cannot be accepted at all because if there was any evidence to show that the other accused were absconding, such a report ought to have been filed before the court. From the above circumstances, this Court is forced to hold that the case put forwarded by the prosecution that there were 4 to 5 persons assembled at Curbala junction on the day of the incident and the appellant was one among them and he was arrested by the police as

alleged by the prosecution is correct. However, it could be seen that Ext.P1 the recovery mahazar by which the prosecution tried to prove that MO1 was recovered on the statement given by the appellant. But, this alleged recovery is not proved by any independent evidence at all. In the above circumstances, the trial court committed serious error in placing reliance on the evidence adduced by Pws 1 and 5 to find that the appellant was arrested as one of the members who assembled at Curbala junction on the day of the incident. In this context, the statement given by the appellant under Section 313 of I.P.C is also relevant. He had a definite case that he was arrested from the railway station premises while he was on the road and he was not in a position to take care of himself as he was under the influence of liquor. So, this Court is of the view that the appellant might have been arrested by the police only on the reason that he was seen after having liquor on the road. But, that by itself is not a reason to hold that the appellant was a member as assembled at the Curbala junction as alleged by the prosecution. In the above circumstances, this Court is of the view that the evidences of Pws1, 4 and 5 are not sufficient to hold that the

appellant had committed an offence punishable under Section 402 of the I.P.C as alleged by the prosecution.

4. In the above circumstances, this Court is of the view that as the prosecution failed to prove the case against the appellant beyond reasonable doubt, the benefit of doubt shall be given to the appellant. Consequently, the appeal is allowed. The conviction and sentence awarded against the appellant are hereby set aside and the appellant is acquitted. Hence, the accused in S.C.No.1656/2003 on the file of the Additional District and Sessions (Adhoc) Court-I, Kollam, shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

Before parting with the judgment, this Court has noted that in the court below seven witnesses were examined but in the judgment noted only the names of five witnesses. From the case records it is seen that CW1, one P.C. Alexander and CW2, one D. Chacko were also examined by the court. But their evidence has not been either discussed or included in the judgment. These witnesses have clearly stated that

summons and other notices issued to accused 2 to 5 were entrusted with to serve the above accused. But they could not find whether such accused alive or having any permanent address as shown in Ext.P2 F.I.R. This Court is of the view that omission of the evidence by the trial court is purposeful. Hence, the trial judge is directed to file an explanation to show why the evidence of these witnesses have not been considered in the judgment or included among the name of the witnesses examined by the prosecution. The explanation shall be reached to this Court within one month from the date of receipt of a copy of this judgment. A copy of this judgment also shall be sent to the learned Judge, who have passed the judgment.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

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JUDGMENT

5th January, 2007.